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82-672
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

WILLIE BARNES
Petitioner,

— v. —

LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Where a labor organization has unlawfully exacted payment of dues increases not adopted in accordance with §101(a)(3) of the Landrum-Griffin Act and a member has brought suit under the Act challenging such exaction, may the union, after suit is brought, retroactively legitimize the dues exaction by conducting a "ratification" vote, and thereby defeat the member's suit?

2. Where a proposed dues increase is put to a vote and approved by a segment of the membership of a labor organization, but in such vote another substantial segment of the membership is excluded and barred from voting, does such approval by a segment of the membership meet the requirements of §101(a)(3) for an increase of dues payable by all the members of the labor organization?

3. Where a union member has brought an action challenging a dues exaction as unlawful, and it is shown that his case is meritorious, is the member entitled to judgment declaring the dues exaction unlawful, and to his costs and fees?

THE PARTIES

The petitioner, Willie Barnes, is and for many years has been a member of respondent Local 29 of the Laborers' International Union of North America/Blasters, Drillrunners and Miners Union ("Local 29").

Respondent Local 29 is a local labor organization.

The individual respondents, Louis Sanzo, Amadio Petito and Don Maglione, Jr., are the President, Secretary-Treasurer and Vice President, respectively, of respondent Local 29.*

Respondent Local 29 is here sued both in its own name, pursuant to federal practice, and in the names of its President and Treasurer, pursuant to New York's General Association Law, §13.

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*Sanzo and Petito continue to hold office as President and Secretary-Treasurer, respectively, although both are presently in prison for crimes related to the labor racketeering activities of Samuel "Big Sam" Cavalieri.

Cavalieri, whom Sanzo regarded as his "boss" (see: *United States v. Sanzo*, 673 F.2d 64, 66 (2d Cir. 1982), has been identified in testimony before District Judge Mark A. Constantino as a member of the Lucchese crime family; *United States v. Cavalieri, et al.*, CR-81-00149/150/151, Record at 58, 81 (ED NY Aug. 7, 1981). All three – Cavalieri, Sanzo and Petito – have been found by Judge Costantino to be persons "involved in organized crime"; *Ibid.*, Record at 3 (Aug. 14, 1981). Cavalieri was convicted of criminal contempt for refusing to answer questions concerning, *inter alia*, his awareness of illegal payoffs to Sanzo; *Ibid.*, Record at 3 (May 4, 1981). Sanzo was convicted of tax evasion and conspiracy to defraud the Government, in regard to moneys turned over to him by employers with whom Local 29 bargained; see: *United States v. Sanzo, supra.* Petito was convicted of criminal contempt and perjury in connection with his testimony denying his attendance at a meeting with Cavalieri; see: *United States v. Petito*, 671 F.2d 68 (2d Cir. 1982).

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LOUIS SANZO, AMADIO PETITO and DON MAGLIONE, JR., jointly and severally, both in their individual and representative capacities as President, Secretary and Vice-President, respectively of LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION and LOCAL 29 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA/BLASTERS, DRILLRUNNERS, and MINERS UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 17, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 680 F.2d 3 and is attached hereto (App. 1a-6a) as Exhibit "A."

There was no opinion rendered by the United States District Court for the Southern District of New York. The latter's Order and Judgment, dismissing the complaint, is (App. 7a-10a) is attached hereto as Exhibit "B."

The Judgment of the Court of Appeals (App. 11a-12a) and the Order denying petition for rehearing (App. 12a-13a) are attached hereto as Exhibit "C."

JURISDICTION

The Opinion of the Court of Appeals and its Judgment were entered May 17, 1982. The Petition for Rehearing was denied by Order of July 14, 1982, making such judgment final.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and in accordance with Supreme Court Rule 17(a) and (c).

STATUTES INVOLVED

Section 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411(a)(3) provides as follows:

> (3) Dues, Initiation Fees, and Assessments. — Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except —

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members of the executive board or similar government body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §412, provides as follows:

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

Petitioner ("Barnes") is a member of respondent Local 29 ("the Union"), a local labor organization. He brought the suit

below on December 31, 1979, pursuant to Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (or "LMRDA"), 29 U.S.C. §412, alleging that the Union and its officers had increased the rates of dues payable by members of the labor organization in violation of §101 (a) (3) of the LMRDA, 29 U.S.C. §411 (a) (3).

It is undisputed that in fact the Union had increased the rates of dues unlawfully, in violation of §101 (a) (3) (App. 2a-3a). Commencing in 1972, the Union and its officers had exacted from the Union's members a work-tax dues of 10¢ per hour, which the Union (and its officers) increased to 15¢ per hour in 1975, to 20¢ per hour in 1976 and to 25¢ per hour in 1977. The dues were checked off from members' paychecks. Neither the original 10¢ dues, however, nor any of the increases had been approved by secret ballot vote of the membership, as required by §101 (a) (3) of the LMRDA.

On March 8, 1980, in an oral pretrial order, the District Court directed that a ratification vote be held to determine whether the original increases in dues checkoff had been properly and freely voted upon (App. 8a). Four divisions for class voting were established, one for each dues increase. All members who had joined the Union after a dues increase had gone into effect were excluded from the division established for that increase. A "ratification" vote was then conducted on each increase, with all members who did not fall into a division excluded from voting on the increase in question. Each dues increase was approved in such voting by less than a two-to-one margin (App. 9a).

No trial or evidentiary hearing was held.

The District Court granted judgment for defendants, dismissing the Complaint without costs (App. 10a).

The Court of Appeals affirmed, holding that the "ratification" vote legitimized the original, unlawful dues collections, and was valid both prospectively and retroactively (App. 1a-6a). The Court distinguished its decision from those in other circuits holding that such ratification votes have no retroactive validity, on the ground that here the ratification vote was conducted with judicial sanction as a remedy for an LMRDA violation (App. 4a).

On the same ground, it rejected the argument that exclusion of a substantial segment of Local 29's membership (those who had become members since 1972) from participating in one or more of the ratification votes violated §101 (a) (3) (App. 5a-6a).

REASONS FOR GRANTING THE WRIT

The decision below holds that the Union's admittedly unlawful exaction of the dues increases from its members was legitimized, retroactively, by a "ratification" vote conducted after this suit was brought. That holding is in conflict with decisions of the courts of appeals of the First and Fifth Circuits. See: *infra*, pages 5 to 7.

The conflict presents serious questions concerning the protection of union members against arbitrary financial exactions under §101 (a) (3) of the LMRDA. The LMRDA provides *no* method for enforcement of §101 (a) (3) *other than* private suit by union members whose rights have been infringed by a violation. But under the decision below, a union's officials may, after a meritorious suit challenging an unlawful dues exaction has been brought, legitimize their unlawful exactions by conducting a "ratification" vote and may, thereby, obtain dismissal of the member's complaint and require him to bear his own costs and fees of litigation. It is thus extremely improbable that union members will, in the future, bring such suits. As a result, union officials are rendered free to flout, if they wish, the requirements of §101 (a) (3) and to exact dues payments from members in violation of the LMRDA, without fear that they will ever be held accountable. See: *infra*, pages 7 to 9.

I. The Decision Below Is in Conflict with Decisions of the First and Fifth Circuits.

The First and Fifth Circuits have held that a past, unlawful collection of a dues increase cannot be retroactively legitimized by a new "ratification" of the dues increase. *Local No. 2 v. International Brotherhood of Telephone Workers*, 362 F.2d 891, 896 (1st Cir. 1966), *cert. denied*, 385 U.S. 947; *Landry v. Sabine Independent Seamen's Association*, 623 F.2d 347, 350 (5th Cir. 1980).

In *Local No. 2*, an international union had adopted a dues increase not in accordance with §101 (a) (3) and had put the same into effect. Some ten months later, its convention approved the increase, and voted that the approval be retroactive to the date that the increase had gone into effect. Though holding that the approval was valid prospectively, the First Circuit rejected the convention's attempt to make it retroactive, holding that "This we do not countenance." *Ibid.*, 362 F.2d at 896.

The First Circuit noted, *Ibid.*, 362 F.2d at 896, that the union's ratification vote "must have been influenced, at least to some extent, by the fact that the 'assessment' for which it voted consisted of monies already collected." It concluded:

> Where the collection has been improperly achieved we think the membership must be given the benefit of the doubt. We think it more consonant with the intent of Congress to hold that dues increases illegally collected cannot be ratified, and that they should be refunded.

In *Landry*, *supra*, the defendant was a local union which had in 1975 increased its dues from $4 per month to $10 per month, without a secret ballot vote. In 1977, it ratified the increase by a secret ballot referendum. Following the First Circuit's decision in *Local No. 2*, *supra*, the Fifth Circuit held that the increase could not be ratified retroactively by the 1977 election; *Ibid.*, 623 F.2d at 350.

Other courts have followed the same principle in disapproving retroactive authorization for acts which, at the time they were committed, violated the LMRDA for lack of proper authorization; *cf. Kerr v. Shanks*, 466 F.2d 1271, 1276, n.3 (9th Cir. 1972), and cases there cited.

As a basis upon which to distinguish its decision from *Local No. 2* and *Landry*, *supra*, the Court below asserts that, in the instant case as distinct from the others, "the district court, pursuant to Section 102 of the LMRDA . . . , ordered the ratification vote as a remedy for an LMRDA violation" (App. 4a). The Court then goes on to suggest that, given the small size of the union and the amount of money involved, the District Court "could have con-

cluded" that refund of the unlawfully-collected dues would be "disadvantageous" to the membership (App. 5a).

The Court's assertion and suggestion, however, are contradicted by the facts recited in the opinion itself (App. 3a-4a). The District Court never reached or addressed the issue of what remedy might be appropriate for the LMRDA violations complained of by Barnes or whether refund would be "disadvantageous." Instead, it granted judgment for respondents (defendants below), dismissing Barnes's complaint. The "ratification" vote had been ordered *not* as a remedy but rather "to determine whether or not the previously initiated increase was properly and freely voted upon" (App. 8a).

Thus the fact that there had been an oral judicial direction for a "ratification" vote (unrecorded, save for a description of it in the Judgment, App. 8a to 10a) offers no basis for distinguishing the present case from *Local No. 2* and *Landry*, *supra*. The considerations expressed by the First and Fifth Circuits for denying retroactive validity to a "ratification" vote apply regardless of whether such "judicial sanction" is or is not involved.[1]

II. The Conflict Poses Serious Questions Regarding Enforcement of the Union Members' "Bill of Rights."

Title I of the LMRDA, 29 U.S.C. §§411-415 — the "Bill of Rights of Members of Labor Organizations" — was specifically designed by Congress to promote the "full and active participation by the rank and file in the affairs of the union"; the rights there enumerated were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership"; *cf. Hall v. Cole*, 412 U.S. 1, 7-8 (1973). Section 101(a)(3) forms a part of this framework, "by requiring participation by all members, either

[1]Other arguments offered by the Court below to distinguish *Local No. 2* and *Landry* have even less force. Thus, it is irrelevant that Barnes paid the unlawfully-adopted dues (App. 3a) for several years (App. 5a), by check-off authorization (see: App. 8a). A "waiver" argument based on such facts was explicitly rejected in *Landry*, *supra*, 623 F.2d at 350. Nor can the fact that recently-admitted members were excluded from participating in the "ratification" vote (see: App. 5a) avoid the conflict with *Local No. 2* and *Landry*.

directly or through their elected representatives, on certain union matters thought to be of special importance"; *cf. American Federation of Musicians v. Wittstein*, 379 U.S. 171, 181 (1964). Congress recognized that effective safeguards against arbitrary financial exactions, in unions as in the larger society, are an essential part of the "framework" of democratic rights generally. Compare: *Wittstein, supra*, 379 U.S. at 181, with *Hampden's Case*, (1637) 3 S.T. 825; and see: VI Holdsworth, *A History of English Law* (1927) 52-54.

Following the lead of Senator McClellan, Congress looked upon the rights guaranteed to union members by what is now Title I of the LMRDA as "the tools they can use themselves" to democratize and clean up their unions. See: II NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (1961) ("Leg. Hist."), 1102-1103. The original McClellan proposal was replaced by a "Kuchel Substitute," *cf. American Federation of Musicians v. Wittstein, supra*, 379 U.S. at 180, which carried the concept of reliance upon the members' initiative one step further: it relied upon private suit by union members themselves, instead of upon suit by the Secretary of Labor, to enforce the provisions of the "Bill of Rights of Members of Labor Organizations." This reliance upon private suits was, as Senator Kuchel put it, "one of the major changes in [his] proposal"; II Leg. Hist. 1232. Senator Clark, a fellow-sponsor of the Kuchel Substitute, explained, II Leg. Hist. at 1233,

> [I]t takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts.

Necessarily, the success of Congress's scheme depends upon the ability and readiness of union members to vindicate Title I rights through private litigation. Thus placing its reliance upon private suits by union members, Congress was concerned that the plaintiff-member should *not* be required to "shoulder the burden of litigation costs himself." See: *Hall v. Cole, supra*, 412 U.S. at 11, n.19. For the same reason, Congress favored the allowance of counsel fees to plaintiff-members in Title I litigation. *Ibid.*, 412

U.S. at 12-13. In quoting with approval from the opinions of lower courts, *Ibid.*, 412 U.S. at 13-14, this Court has observed that *not* to award fees to such a plaintiff "would be tantamount to repealing the Act itself by frustrating its basic purpose."

In this case, Barnes—like the plaintiff in *Hall v. Cole, supra*—sought to effectuate Congress's purpose by bringing suit to vindicate rights that Congress had guaranteed to him and to his fellow members when it enacted Title I. His suit was "undisputed[ly]" meritorious: App. 2a-3a. The District Court, however, never considered awarding him his costs or attorney's fees. Worst of all, it denied him judgment in his favor and granted judgment, instead, for defendants.

The decision below holds that it does not matter how meritorious the member's suit may be. Judgment is to be granted for defendants and the member's complaint is to be dismissed, without costs or fees to the member, if and as soon as a ratification vote retroactively approves the dues increase.

In the face of such a prospect, few members would be so imprudent as to seek to effectuate §101 (a) (3) at their own, individual expense. The decision below is thus tantamount to repealing §101 (a) (3) by frustrating its basic purpose.

III. The "Ratification" Should be Declared Invalid Prospectively, as well as Retroactively.

In *Local No. 2, supra*, the First Circuit held that the ratification vote there involved, since it met the requirements of §101 (a) (3), was valid in its prospective, though not in its retroactive, effect. Here, however, the ratification vote did *not* meet §101 (a) (3)'s requirements, since, by the District Court's direction, many members (those who joined since 1972) were excluded from participation. Such exclusion is not provided for by §101 (a) (3). This Court noted in *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 181 (1964) that §101 (a) (3) (B) "requir[es] participation by *all* members" (*emphasis added*). So does §101 (a) (3) (A).

The Court below upholds prospective effect of the "ratification" vote by terming it a "remedy" for an LMRDA violation

(App. 6a). As noted *supra*, that misstates the facts, since the District Court did *not* find, or seek to remedy, any LMRDA violation. Instead, it dismissed the complaint which alleged such a violation.

IV. The Court of Appeals Has Sanctioned a Departure from the Established and Usual Course of Proceedings.

In the usual and established course of judicial proceedings, a plaintiff whose suit is meritorious is entitled to judgment in his favor. It is undisputed here that Barnes's suit was meritorious (App. 2a-3a). Yet here the District Court denied him judgment and granted judgment, instead, for defendants, dismissing his complaint (App. 10a). Obviously, in so doing, it departed from the established course of judicial proceedings. The Court of Appeals has so far sanctioned such departure as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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